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82 -231
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES MOTHON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it permissible for a federal court to allow the government to engage in pre-trial discovery depositions in a criminal matter pursuant to Fed. R. Crim. P. 15(a) despite the express statement in the advisory note to Rule 15(a) that its provisions not be used for the purpose of pre-trial discovery?

PARTIES TO THE PETITION

The only party to this petition is petitioner Charles Mothon. In the Court below, Mothon's co-defendants-appellants were as follows: General Electric Company; Schenectady Turbine Services, Ltd.; Twombly, Inc.; Robert Naples and Hoyt P. Steele. Except for defendant Twombly, Inc., it is petitioner Mothon's belief that no other parties to this action in the Court below desire to join in this petition.

The respondent is the United States of America.

TABLE OF CONTENTS

Question Presented i

Parties to the Petition i

Opinions Below 1

Jurisdiction 2

Federal Rule Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

The decision of the Third Circuit to permit depositions in a criminal matter pursuant to Fed. R. Crim. P. 15 where the effect was to permit the government to engage in impermissible pre-trial discovery is in direct conflict with the advisory note to Rule 15 and presents an important question of federal law that should be resolved by this court 8

A. The Applicable Law: Elements of the Movant's Burden of Proof Under Rule 15(a) 8

B. Deficiencies in the Government's Showing . 11

Conclusion 15

APPENDIX A

June 16, 1982 Opinion of the Third Circuit Court of Appeals 1a

APPENDIX B

June 16, 1982 Judgment of the Third Circuit Court of Appeals 33a

TABLE OF CONTENTS

APPENDIX C

October 1, 1980 Opinion of the United States District Court for the District of New Jersey 36a

APPENDIX D

Affidavit of Prosecutor Joseph Covington 43a

TABLE OF AUTHORITIES

CASES CITED:

United States v. Adcock,
558 F.2d 397 (8th Cir.), *cert. denied*,
434 U.S. 921 (1977) 9

United States v. Ausmeier,
5 F.R.D. 395 (E.D.N.Y. 1946) 11

United States v. Bello,
532 F.2d 422 (5th Cir. 1976) 11

United States v. Mann,
590 F.2d 361 (1st Cir. 1978) 9, 10

United States v. Mitchell,
385 F. Supp. 1190 (D.D.C. 1973), *aff'd sub nom.* United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933, (1977) 10, 11

United States v. Rich,
580 F.2d 929 (9th Cir.), *cert. denied*
439 U.S. 935 (1978) 9, 10

United States v. Singleton,
460 F.2d 1148 (2d Cir. 1972), *cert. denied* 410 U.S. 984 (1973) 10

United States v. Steffes,
35 F.R.D. 24 (D. Mont. 1964) 9

TABLE OF CONTENTS

CASES CITED:

United States v. Wilson,
601 F.2d 95 (3d Cir. 1979) 10

CODES CITED:

18 U.S.C. §1952 3

28 U.S.C. §1254(1) 2

RULES CITED:

Fed. R. Civ. P. 28(b) 4

Fed. R. Crim. P. 15(a) 2-4, 7-11

Fed. R. Crim. P. 16 15

Fed. R. Crim. P. 57(b) 4

OTHER AUTHORITY CITED:

8 Moore's Federal Practice §15.01[3] (1980) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

CHARLES MOTHON

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Charles Mothon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 16, 1982.

OPINIONS BELOW

The June 16, 1982 opinion of the Third Circuit Court of Appeals has not yet been reported officially. A copy of the Third Circuit's slip opinion is annexed to this Petition as Appendix A.

That aspect of the October 1, 1980 unreported oral opinion of the United States District Court for the District of New Jersey pertaining to the Rule 15 issue is annexed to this Petition as Appendix C.

JURISDICTION

The judgment of the Third Circuit Court of Appeals reversing petitioner's convictions and ordering a new trial was entered on June 16, 1982, and a copy thereof is annexed to this Petition as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 15(a) provides:

> (a) *When Taken*. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

STATEMENT OF THE CASE

On September 4, 1980, a federal grand jury sitting in Newark, New Jersey returned a seven-count indictment against petitioner Mothon, and his co-defendants:

General Electric Company ("GE"); Schenectady Turbine Services, Ltd.; Twombly, Inc.; Robert Naples and Hoyt P. Steele. The indictment charged, in essence, that the three individuals and three corporate defendants conspired and carried out a scheme lasting from May, 1973 to June 30, 1976 to pay a bribe to one Carlos Velasquez Toro, an official of a publicly-owned utility of the Puerto Rico Water Resources Authority ("PRWRA"), in return for Toro's use of his influence to obtain for GE a contract to construct a power generating plant for the PRWRA in Puerto Rico. On February 11, 1981, a jury sitting in the United States District Court for the District of New Jersey found all of the defendants guilty on all but Count six of the seven-count indictment.

On June 16, 1982, the Third Circuit Court of Appeals issued a judgment (Appendix B) and opinion (Appendix A): (1) reversing the conviction of Robert Naples on all counts; (2) reversing the convictions under Counts 2, 3 and 5 for all of the other defendants on the grounds that the District Court should have entered directed verdicts of acquittals on these counts; and (3) setting aside the convictions of the defendants on Counts 1, 4 and 7 and remanding for a new trial on these counts.[1]

This petition for certiorari is limited solely to the question of whether the Third Circuit erred in ruling that it was proper for the government to take depositions in Bermuda and Canada pursuant to Fed. R. Crim. P. 15(a) even though the government was not in a position to satisfy the procedural prerequisites for the taking of Rule 15 depositions and the primary purpose for taking

1. The seven-count indictment referred to above was consolidated for purposes of trial with a one-count indictment that charged only defendant Twombly, Inc. with violating the Travel Act, 18 U.S.C. §1952. Twombly, Inc. was convicted on this one-count indictment and this conviction was affirmed by the Third Circuit on appeal. *See* Appendix A.

these depositions was to engage in pre-trial discovery. Although the Third Circuit reversed the convictions of the petitioner, the Rule 15 issue raised by this petition is not moot because of the remand on Counts 1, 4 and 7 for a new trial. The following facts relate to the Rule 15 issue.[2]

Following the return of the September 4, 1980 indictment, the government filed a motion on September 22, 1980 to take the depositions of certain foreign nationals residing in Bermuda, Canada and England pursuant to Fed. R. Crim. P. 15(a) and a request for International Judicial Assitance pursuant to Fed. R. Crim. P. 57(b) and Fed. R. Civ. P. 28(b). The sole factual basis for the government's Rule 15(a) request was an affidavit by prosecutor Joseph Covington. A copy of Covington's affidavit is annexed hereto as Appendix D. In this affidavit the government was forced to indicate that it had never spoken directly to any of the persons it wished to depose and, as a consequence, the government was not able to set forth any facts the deponents would testify about, nor how or why their testimony was so material to the case as to justify the taking of a Rule 15 deposition. Based on that single affidavit, the government sought to take depositions: (1) in Canada of Michael Candy; Bruce Forcey and Warren Kuk; (2) in Bermuda of William Cox; Michael B. Collins; the custodian of records for the Bermuda National Bank; an officer of the Bermuda Monetary Authority, and the Registrar of Companies; and (3) in England of Douglas Field.

All the defendants vigorously objected to the taking of the depositions on the ground, *inter alia*, that the government had failed to meet the rigid factual and legal prerequisites for the Court's exercise of discretion to permit depositions under Fed. R. Crim. P. 15(a). The thrust

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2. The facts of the entire case are set forth in detail in the opinion of the Third Circuit annexed hereto as Appendix A.

of these objections was that the government had no knowledge of the content of the testimony of any of the deponents and that the depositions were actually for the purpose of pre-trial discovery, an impermissible use of a Rule 15(a) deposition.

Defendants argued that the government's candid concession that it was unaware of what the deponents might say was dispositive of the fact that the government was actually asking for pre-trial discovery. The District Court granted the motion nonetheless. In so ruling from the bench, the District Court essentially reasoned that because the deponents were foreign nationals who refused to talk to the government, circumstances justified a relaxing of Rule 15's prerequisites:

> b. The second required showing under Rule 15(a) is that the witness' testimony be material to the issues in the case. This is a most difficult judgment for a court to make prospectively, without the opportunity to review a sworn statement of the proposed witness. In the typical Rule 15 application, a witness who may be unavailable *for trial* will logically be available at some time before trial. Thus, the party requesting leave to conduct a Rule 15 deposition will have taken a statement of the witness' testimony. Rule 15 proceedings would be applied for simply as a way of preserving that witness' testimony, because that witness would be unavailable at trial because of death, severe illness or other such circumstances.
>
> Here, on the other hand, we have prospective witnesses who have been either totally unavailable before trial or available only at a previous letters rogatory proceeding. The fact that they are foreign nationals adds an element to the facts before this Court that is simply not addressed by the cases the

> Court has reviewed. The relevancy of the proposed testimony is described in Mr. Covington's affidavit. I am satisfied that this is not a proposed fishing expedition. It appears to me that I should apply the reasoning of the Court in *United States v. Bronston*, 321 F. Supp. 1269, 1271 (S.D.N.Y. 1971), where it was stated that "the mere fact that a necessary witness is a foreign national domiciled abroad and beyond the subpoena power of the Court does not mandate an order pursuant to Rule 15, (but) it is an impelling consideration." We are persuaded that the almost complete unavailability of these proposed witnesses absent letters rogatory issued pursuant to a Rule 15 order is an "impelling consideration" in assessing the government's showing of materiality.

Appendix C at 40a-41a.

Thus, the District Court in effect ignored Rule 15 and its express prohibition against permitting pre-trial discovery in criminal cases. In affirming the District Court's decision on this ruling, the Third Circuit adopted the District Court's approach and held that in light of the unusual circumstances, the government did not have to satisfy Rule 15's normal standards:

> We recognize that Fed. R. Crim. P. 15, which provides for the taking of depositions in criminal cases, does not authorize their use as means of discovery; but we cannot agree with appellants that the depositions at issue were used as discovery tools. Appellants emphasize that the government could not demonstrate to the district court the materiality of the proposed testimony. In view of the government's inability to gain access to the proposed deponents, however, we agree with the district court that under the extremely unusual circumstances of

> this case it could not insist on the usual showing of materiality. In the ordinary case, where the witnesses reside in the United States, the witness who will be unavailable for trial will be available sometime prior to the deposition so that the parties will know with reasonable certainty the materiality of the proposed testimony. We believe that the district court appropriately accepted a reduced showing of materiality to avoid denying important evidence to all the parties, including the appellants, the court, and the jury.

Appendix A at 30a (footnote omitted).

As demonstrated below, despite the unusual circumstances of this case, both the District Court and the Third Circuit improperly ignored the provisions of Rule 15(a) that this rule not be used to permit pre-trial discovery.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit to permit depositions in a criminal matter pursuant to Fed. R. Crim. P. 15 where the effect was to permit the government to engage in impermissible pre-trial discovery is in direct conflict with the advisory note to Rule 15 and presents an important question of federal law that should be resolved by this court.

This case presents an important question of federal law relating to the question of whether it is permissible for a federal court to allow the government to engage in pre-trial discovery in a criminal matter pursuant to Fed. R. Crim. P. 15(a) despite the express statement in the advisory note to Rule 15 that it not be used for the purpose of pre-trial discovery. As set forth below, the decisions of the District Court and the Third Circuit to ignore this prohibition against pre-trial discovery on the reasoning that this case presented "extremely unusual circumstances" was unwarranted and amounted to an ad hoc judicial amendment of the standards governing the issuance of Rule 15 depositions.

A. *The Applicable Law: Elements of The Movant's Burden of Proof Under Rule 15(a).*

Fed. R. Crim. P. 15(a) provides in relevant part:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time or place. . . .

Two important features of this language warrant initial discussion. First, Rule 15(a) does not authorize discovery depositions, but only authorizes depositions of the moving party's own witnesses to preserve their testimony for use at trial. Numerous courts have held that depositions in a criminal case properly have no discovery function. *See, e.g., United States v. Mann*, 590 F.2d 361, 365 (1st Cir. 1978); *United States v. Rich*, 580 F.2d 929, 933-934 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978); *United States v. Adcock*, 558 F.2d 397, 406 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Steffes*, 35 F.R.D. 24 (D. Mont. 1964). As the Notes of the Advisory Committee on the 1975 Amendment to Rule 15 explain, the Rule's "principal objective is the preservation of evidence for use at trial. *It is not to provide a method of pretrial discovery* nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness." (emphasis added).

Second, the rule authorizes the Court to order that the deposition of the moving party's own witness be taken so that the witness's testimony may be preserved for use at trial only when "due to exceptional circumstances" the "interest of justice" so requires. This exacting standard, which indicates that depositions should be sparingly allowed, must be rigorously applied because "allowing depositions too freely would create the risks that parties . . . would try to use depositions in lieu of live testimony at trial in contravention of the spirit of the Sixth Amendment." *United States v. Mann, supra*, 590 F.2d at 365.

Mindful of the rule's limited purpose and function, the courts have established a series of prerequisites for a party seeking to take a deposition pursuant to Rule

15(a).[3] In the first place, the movant must show that the witness will not be available to appear at trial, despite all reasonable efforts to secure his appearance. *United States v. Mann, supra*, at 366; *United States v. Rich, supra*, at 933-34. In addition, the movant must show that the proposed deponent's expected testimony is material and necessary to prevent a failure of justice. These requirements serve the dual function of helping to establish "exceptional circumstances" and ensuring that the deposition is being sought to preserve the testimony of the movant's own witness, not for discovery.

There are numerous examples of these prerequisites. In *United States v. Wilson*, 601 F.2d 95 (3d Cir. 1979), the Court ruled that the defendants should have been allowed to take the deposition of a fugitive from justice not subject to extradition because the defendants submitted an affidavit from the proposed deponent, which "established that his testimony was relevant and, if believed, would have been exculpatory to some extent." 601 F.2d at 98. In contrast, the defendants in *United States v. Mitchell*, 385 F. Supp. 1190 (D.D.C. 1973),

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3. Three of these prerequisites, that the prospective witness will be unable to attend the trial, that the witness' testimony is material, and that it is necessary to take the witness' deposition in order to prevent a failure of justice, were explicitly contained in Rule 15(a) before it was amended in 1975. Although Congress substituted the phrase "exceptional circumstances" in 1975, that language, as Congress knew and intended, had been judicially defined in terms of the three requirements spelled out in the pre-1975 version of Rule 15(a). *United States v. Singleton*, 460 F.2d 1148, 1153-1154 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). *See* 8 Moore's Federal Practice, §15.03[1] (1980). Cases subsequent to the 1975 amendment have confirmed that the pre-1975 Rule 15(a) requirements are implicit in the "exceptional circumstances" standard. *E.g., United States v. Rich*, 580 F.2d 929, 933 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978). In the District Court the government concurred in this interpretation. *Memorandum of the United States in Support of its Motion for Leave to Take Depositions*, 1-2.

aff'd sub nom. United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), were refused authorization to take President Nixon's deposition because Nixon's expected testimony was "cumulative," not "indispensable," and because "[t]here has been no showing by way of statement, affidavit, or otherwise from Mr. Nixon that he would, in fact, testify along the lines the defendants have predicted." 385 F. Supp. at 1193. *Accord*, *United States v. Bello*, 532 F.2d 422, 423 (5th Cir. 1976). Similarly, in *United States v. Ausmeier*, 5 F.R.D. 395, 396 (E.D.N.Y. 1946), the Court denied defendants' motion under Rule 15 for an order authorizing the taking of certain depositions in Germany because the movants had not discussed with the witnesses or their representatives what testimony they would give in the event their depositions were taken.

In summary, if the prosecution moves for an order authorizing a deposition under Rule 15(a), it must submit an affidavit or other evidence from the proposed deponent sufficient to permit the Court to make a judgment as to the "exceptional circumstances" and "interest of justice" requirements of Rule 15. The judgment as to the extent of the government's need for the deposition evidence obviously cannot be made in a vacuum. The government must indicate what the prospective deponent would say and why that evidence is crucial to the case. The fact that the government submits an affidavit to the effect that a deponent might have relevant information is not enough.

B. ***Deficiencies in the Government's Showing***

The affidavit of prosecutor Covington (Appendix D) was the government's sole factual basis for its Rule 15 request. As the following analysis shows, Covington's affidavit failed to satisfy the requirements of Rule 15(a)

as to each of the following witnesses.[4] In essence, Covington's affidavit only suggests that because the deponents occupied positions that brought them into contact with the defendants' business transactions there is a possibility that the deponents might be able to supply some information that would be relevant to the case. However, this type of showing, it is submitted, only reaffirms the petitioner's basic position: that the government was engaged in pre-trial discovery in the hope it would uncover inculpatory evidence.

1. *Michael Candy*

Covington's affidavit states that he was advised by counsel for the Bank of Nova Scotia that Michael Candy "is an employee of the Bank of Nova Scotia, residing in Toronto, who during 1974 and 1975 had been working as a bank manager at the Bermuda National Bank." Appendix D at 43a-44a. The bank counsel further advised Covington that Candy "was prepared to testify that he recalled knowing Charles Mothon and Carlos Velazquez Toro while working at the Bermuda National Bank." (*Id.*) This was the full extent of the showing of materiality.

The government clearly did not justify its request to depose Michael Candy under the standards of Rule 15(a). There was no statement by Michael Candy, his representative, or even by Covington, of what Candy would testify to if his deposition were taken, other than that he knew Mothon and Toro. This falls far short of a showing that Candy's expected testimony was material and necessary to prevent a failure of justice. That Candy

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4. The testimony of each of the following witnesses was critical to the government's case and will be similarly critical at the retrial of Counts 1, 4 and 7.

knew Toro and Mothon while he worked at the Bermuda National Bank certainly does not incriminate any of the defendants. The government failed to specify in any way what relevant information is alleged that Mr. Candy had, and how such information was essential to the prosecution's case. The government was in fact seeking to take a discovery deposition, a procedure unauthorized by Rule 15(a) and improper in a criminal case.

2. *Bruce Forcey*

The government's request to depose Bruce Forcey was similarly infirm. Covington's affidavit stated that he had been advised that Bruce Forcey succeeded Michael Candy as manager at the Bermuda National Bank in August 1975 and that "[b]ank records reveal that on August 19, 1975, Mr. Forcey caused a certificate of deposit belonging to Turbo Electric Equipment Ltd. in the amount of $165,800.23 to be cashed before its maturity date." Appendix D at 44a.

Once again, the government was seeking an impermissible discovery deposition. Although Covington's affidavit stated that Forcey was manager of the Bermuda National Bank and that bank records indicated that he caused the specified certificate of deposit to be cashed, it did not state what Forcey's testimony would be regarding the alleged cashing of the certificate of deposit or any other matters. Indeed, when Forcey ultimately was deposed in Canada, he testified that he had no recollection of the August 19, 1975 transaction referred to in Covington's affidavit. Consequently, the District Court was in no position to determine whether Forcey's testimony would be essential to the prosecution's case and necessary to prevent a failure of justice, or, on the other hand, irrelevant, cumulative, or helpful to the defense. Accordingly, the government failed to discharge its burden under Rule 15(a) of showing that "exceptional circum-

stances" made it "in the interest of justice" for Forcey's testimony to be taken and preserved for use at trial.

3. *William Cox*

As to William Cox, a British citizen and a member of the Hamilton, Bermuda law firm of Cox and Wilkenson, Covington's affidavit stated that Cox "appears as a director of both Turbo Electric Equipment, Ltd. and Power Equipment Ltd.," that Cox "previously testified in the matter of *United States v. Twombly, Inc.*, CR 80-73, that he knew Charles Mothon as the individual who directed the affairs of Turbo Electirc Equipment, Ltd.," and that Cox had recently advised the government "that he still had some minute books and other records of Power Equipment, Ltd." Appendix D at 46a.

The government's showing in support of its request to depose Cox was deficient on familiar grounds. There was no representation of what Cox would testify to and why that testimony was so material to the prosecution's case that its preservation was necessary to prevent a failure of justice. All that was shown was that Cox knew defendant Mothon, that Cox may have held directorships in Turbo Electric Equipment, Ltd. and Power Equipment, Ltd., and that he may have been in possession of some records of Power Equipment, Ltd.

4. *The Bermuda Bank Records*

Covington's affidavit failed to show what transactions the bank's records depicted, when they occurred, and how they bore on the government's case. In short, the government's motion for leave to take the deposition of the custodian of records of the Bermuda National Bank failed to show how the bank's records were material and essential to the prosecution's case. Accordingly, the motion should have been denied.

CONCLUSION

The government's motion for leave to take depostions in three foreign countries was without foundation in law. The government is charged with the determination of facts before it secures an indictment. After an indictment has been returned, the government may conduct limited discovery pursuant to Fed. R. Crim. P. 16. *Rule* 15, however, expressly forbids the government to take pre-trial discovery. Nevertheless, the District Court and the Third Circuit erroneously relieved the government of its burden under Rule 15 and impermissibly sanctioned pre-trial discovery. This ruling was incorrect as a matter of law and presents a significant issue of federal law that merits the granting of this petition to review the judgment of the Third Circuit.

Respectfully submitted,

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Dated: August 5, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2130 & 81-2184/85/86/87/88/89

UNITED STATES OF AMERICA

v.

STEELE, HOYT P.,
Appellant in No. 81-2130

(D.C. Criminal No. 80-00320-02)

UNITED STATES OF AMERICA

v.

GENERAL ELECTRIC COMPANY,
Appellant in No. 81-2184

(D.C. Criminal No. 80-00320-01)

UNITED STATES OF AMERICA

v.

NAPLES, ROBERT,
Appellant in No. 81-2185

(D.C. Criminal No. 80-00320-03)

UNITED STATES OF AMERICA

v.

TWOMBLY, INC.,
Appellant in No. 81-2186

(D.C. Criminal No. 80-00320-04)

UNITED STATES OF AMERICA

v.

SCHENECTADY TURBINE SERVICES, LTD.,
Appellant in No. 81-2187

(D.C. Criminal No. 80-00320-05)

UNITED STATES OF AMERICA

v.

MOTHON, CHARLES,
Appellant in No. 81-2188

(D.C. Criminal No. 80-00320-06)

UNITED STATES OF AMERICA

v.

TWOMBLY, INC.,
Appellant in No. 81-2189

(D.C. Criminal No. 80-00073)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued April 26, 1982

Before: ALDISERT, WEIS, and BECKER, *Circuit Judges*

(Filed June 16, 1982)

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JUNE 16, 1982 OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

ALDISERT, *Circuit Judge.*

The main question for decision in these consolidated appeals, in a complex criminal case involving payment of

graft by one of America's largest electrical equipment manufacturing companies to a Puerto Rican official and the laundering of payments to him through a subcontractor based in Bermuda, is whether the indictments are barred by the statute of limitations. Three corporations and three individuals appeal from judgments of conviction and sentence entered on a jury verdict finding them guilty of wire fraud, mail fraud, interstate travel in aid of racketeering, and conspiracy. We affirm the conviction of appellant Twombly, Inc. on interstate travel charges brought in a separate indictment. We reverse all convictions under counts 2, 3 and 5 of the principal indictment, which relate to conduct occurring after November 5, 1975, when appellant General Electric revealed the scheme to the Governor of Puerto Rico, because we hold that the conspiracy ended as a matter of law on that date. We also reverse appellant Robert Naples' convictions on all counts because he withdrew from the conspiracy prior to the period of limitations. We set aside the convictions and remand for a new trial on the remaining counts 1, 4, and 7, because the defendants were denied reasonable notice and opportunity to defend against the specific factual theory on which the government based its argument that the conspiracy extended beyond the accomplishment of its principal objectives and into the period of limitations, and because we are unable to determine whether the jury's verdict was based on an impermissible ground.

I.

The theory underlying the prosecution is that the appellants and others conspired and succeeded in obtaining a multi-million dollar power plant construction contract for appellant General Electric by bribing a Puerto Rican public official, and that they thereby defrauded the government and people of Puerto Rico of the right to the

official's faithful and disinterested services, in violation of the federal wire and mail fraud statutes, the Travel Act, and Puerto Rican law. The appellants allegedly created and transferred a "bribe fund" through a complex series of subcontract transactions designed to conceal its source and its payment. The substantive charges set forth in the two indictments relate to conduct that allegedly furthered this conspiracy. Indictment No. 80-73, returned on March 14, 1980, charged appellant Twombly, Inc. in a single count with interstate travel in aid of racketeering in violation of the Travel Act, 18 U.S.C. §1952. Indictment No. 80-320 was returned on September 4, 1980, charging each appellant in seven separate counts. The two indictments were consolidated for trial. Twombly, Inc. was convicted of the Travel Act offense charged in indictment No. 80-73. Each defendant was acquitted on count 6 of indictment No. 80-320; and each was found guilty of wire fraud, in violation of 18 U.S.C. §1343 (counts 1 and 2); mail fraud, in violation of 18 U.S.C. §1341 (count 3); interstate travel in aid of racketeering, §1952 (counts 4 and 5); and conspiracy, under 18 U.S.C. §371 (count 7). Each defendant has appealed, and we ordered the appeals consolidated for briefing and oral argument.

The various contentions presented by the several defendants require us to consider whether the prosecution was time-barred as to some or all charges; whether Puerto Rico is a "State" as contemplated in the Travel Act, 18 U.S.C. §1952; whether the government abused the grand jury process or evidentiary standards in obtaining the indictments; whether there was sufficient evidence to support the conviction of Schenectady Turbine Services, GE, and Twombly, Inc.; whether admission of Bermuda bank records, videotaped depositions, and the past-recollection-recorded testimony of witness Frank Ayer was impermissible; and whether a new trial

should be granted because a mid-trial shift in the government's theory of the continuance of the conspiracy denied appellants reasonable notice and a fair opportunity to defend against the government's allegations.

II.

We begin by setting forth generally the facts underlying the prosecution, crediting all testimony in support of the judgment and indulging in all reasonable inferences favorable to the prosecution.

A.

In the spring of 1973, the Puerto Rico Water Resources Authority (PRWRA) invited a number of companies, including appellant GE, to submit bids for the construction of a large steam and gas turbine (STAG) power plant in Aguirre, Puerto Rico. The bid invitation required compliance with certain basic specifications, but it permitted substantial differences among the competing proposals. The Authority's evaluation of the competing bids was, therefore, necessarily complex and somewhat subjective.[1]

In June 1973, several high-level employees of GE's Gas Turbine Division, including appellant Robert Naples, met to discuss bidding strategy. They agreed that GE would bid both as a prime contractor and as a turbine equipment subcontractor for another prime bidder, Hitachi America, Ltd.

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1. Witness Richard Kask, who in 1974 was manager of sales for Latin America in GE's International Sales Division, explained that the PRWRA "would evaluate the technical qualities of the equipment offered, the performance, efficiencies, obviously the price, the delivery commitments, all technical aspects, if you will, of equipment such as this. . . . [i]n order to arrive at a comparable basis by which they would then select the final winning bid."

Sometime during the summer of 1973, Richard Kask, an employee in GE's International Sales Division, met with former GE employee Vernon Twombly, the principal owner of appellant Twombly, Inc., which previously had done business in Puerto Rico. Kask said that he believed GE would need assistance in getting the contract, and Twombly indicated that he might be able to assist. Following that conversation, Twombly called appellant Charles Mothon, another former GE employee who was then a marketing representative for Hitachi. Twombly reported Kask's opinion that "help was needed" on the STAG contract, and he suggested that he and Mothon could work together. Mothon replied that he "would have to talk to his friends and find out what was possible." Mothon later called Twombly and indicated that he probably could help, and Twombly relayed that message to Kask. A few days later, Mothon suggested to Twombly that GE would have to pay about $1 million to "friends," a term that Mothon and Twombly understood to refer to persons receiving money in return for aid in obtaining a contract. Mothon indicated to Twombly that his "friend" in this instance was Carlos Velazquez Toro, the Chief of Operations of the PRWRA. Twombly relayed the $1 million figure to Kask.

The bids were opened on September 17, 1973. The competitors were permitted to review each others' bids in detail, according to the PRWRA's usual practice. Hitachi's bid was not competitive, eliminating GE's chance of participating as a subcontractor and leaving GE, Westinghouse (the low bidder), and two other bidders as contenders for the prime contract.

Mothon called Bruce Boni of GE's Gas Turbine Division, an assistant to appellant Robert Naples, a day or two after the bids were announced. Boni and Mothon discussed "what might have to be done if GE was really

interested in pursuing the business," specifically the need to pay a "special commission," a topic familiar to both. Boni then suggested to Naples that GE employ Twombly, Inc. as a subcontractor and a conduit for payment of the bribe, if "the proper permission to go ahead" could be obtained. Boni thereafter discussed the matter with Frank Ayer of GE's International Sales Division, and Ayer promised to explore the question with others in that division.

Naples met on September 26, 1973, with appellant Hoyt Steele, a GE Vice President and head of the International Sales Division. Naples suggested that GE should hire Twombly, Inc. as its installation subcontractor and asked Steele to "approve a payment." Steele met the next day with several other officers of the International Sales Divison. He instructed Richard Kask to advise Vernon Twombly that Twombly, Inc. would be awarded a STAG project subcontract. If "the question of additional funds [to] be made available" to Twombly arose, Kask was to offer $300,000. Kask reported this information to Twombly the same day. Twombly indicated that $300,000 "was probably insufficient," and Kask communicated his response to Steele. Steele thereafter authorized Kask to offer Twombly $1 million. Kask conveyed the second offer to Twombly, and Twombly to Mothon, and Mothon stated that the proposal was acceptable.

On December 3, 1973, as a result of Velazquez Toro's manipulations of the evaluation process, the PRWRA issued a letter of intent to contract with GE for construction of the Aguirre STAG plant. A draft evaluation report prepared by PRWRA staff had recommended awarding the contract to Westinghouse, but the final report signed by the award committee found GE's bid better by $240,000, less than ¼ of one percent of GE's adjusted bid.

The Authority thereafter decided to add a "residual fuel option"[2] to the project, however, and it temporarily suspended GE's letter of intent on January 8, 1974. GE subsequently learned that Westinghouse was prepared to submit a low bid for the additional equipment, and GE lacked Westinghouse's capacity to fabricate some of the necessary components or "skids"[3] in its own plants. Addition of the residual fuel option thus posed a serious threat to GE's slender advantage. GE agreed to add $250,000 to the "special commission," however, and the Authority thereafter decided to negotiate with GE alone for the residual fuel option. GE and the PRWRA signed a contract for construction of the STAG plant on March 15, 1974.

B.

Two factors caused the GE representatives and their co-conspirators to adopt an elaborate subcontract package. First, it was necessary to transfer the "special commission" to Velazquez Toro. Second, it was necessary to conceal the bribe from GE's staff auditors. The government contends also that the evidence would permit an inference that the conspirators adopted the subcontract package to conceal the transaction from "others who might hold them accountable, such as law enforcement officials." The mechanism came to be known as the "scope transfer" because it involved transferring certain

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2. "Residual fuel" is the heavy, dirty remnant from crude oil that has been refined into gasoline, kerosene, and other fuels. Because it is less pure, residual fuel is cheaper than other petroleum fuels. The PRWRA apparently decided to add residual fuel capability to the Aguirre STAG plant to offset partially the higher cost of petroleum that followed the 1973 Arab oil embargo.

3. "Skid" is the industry term for a composite unit of machinery packaged on a single base that performs some discrete function in the power plant.

functions from the "scope" of the GE Gas Turbine Division to the International Sales Division, and from the scope of GE's own operations to an outside contract. Instead of fabricating certain equipment for the STAG project in its own plants or purchasing it from fabricators at wholesale prices through its Gas Turbine Division, GE purchased the equipment at retail from Twombly, Inc. through the International Sales Division. GE thus transferred to Twombly, Inc. the profits attributable to that equipment; and Twombly, Inc. in turn transferred those profits to Mothon by purchasing the equipment from Turbo-Electric Equipment, Ltd. (TEE), a Bermuda corporation controlled by Mothon. Mothon then delivered the money to Velazquez Toro.

By the spring of 1974, GE had discovered that the margin between the wholesale and retail prices of the equipment in the scope transfer was insufficient to generate the full bribe fund. The "margin deficit" was approximately $439,000, including the $250,000 increase in the bribe commitment that resulted from addition of the residual fuel option. GE therefore sought to generate a larger margin by "scope transferring" two sets of components of the residual fuel option, the residual and water wash skids. GE purchased those skids from Twombly Inc., which purchased the equipment from TEE, which in turn obtained it from appellant Schenectady Turbine Sales, Ltd., another company primarily controlled by Mothon. This transfer apparently reduced the margin deficit by $101,600. Unanticipated transportation expenses pushed the total deficit to $487,800, however, but GE apparently wrote off that amount as an "initial price reduction." *See* 7 App. 1648-50.

Payment on the subcontracts between GE and Twombly, Inc. and between Twombly, Inc. and TEE occurred in a series of transfers between the spring of

1974 and June 1976. Because the limitations dates on the two indictments are March 14, 1975, and September 4, 1975, *see* 18 U.S.C. §3282, we are concerned only with four payments. Each is the subject of substantive charges, and each is named as an overt act in furtherance of the illegal conspiracy charged in count 7 of the later indictment.

On May 28, 1975, Twombly, Inc. cabled $94,441.50 from a New Jersey bank to TEE in Bermuda for the balance due on four distillate fuel forwarding skids, which were included in the original scope transfer. Indictment No. 80-73, filed March 14, 1980, against Twombly, Inc., names this conduct as a violation of the Travel Act, 18 U.S.C. §1952.

Twombly, Inc. cabled an identical payment on September 5, 1975, for the balance due on two water wash skids. The second indictment in counts 1 and 4 charges that this conduct violated the federal wire fraud statute, 18 U.S.C. §1343, and the Travel Act.

Again on December 15, 1975, Twombly, Inc. cabled $70,831.12 to TEE, for the balance due on two residual fuel forwarding skids. Counts 2 and 5 similarly allege that this transfer violated §§1343 and 1952.

Finally, on June 27, 1976, Twombly, Inc. mailed to TEE a check for $212,490.36, the balance due on six residual fuel forwarding skids. That mailing is named in count 3 as a violation of 18 U.S.C. §1341 (mail fraud).

The government also introduced evidence that Mothon transferred approximately $1.25 million to Velazquez Toro in Bermuda in 1974. It concedes, however, that it did not introduce sufficient evidence to permit the jury to find that Toro received any portion of the bribe within the applicable periods of limitation.

C.

In June 1975, beset by financial difficulties caused by labor problems in Puerto Rico, Twombly, Inc. asked GE to increase the value of its contract. GE agreed to consider the request and sent its employee Carl Mutch to audit Twombly, Inc.'s project records. Apparently suspecting that the transaction was tainted by impropriety, Mutch pressed Vernon Twombly for a full disclosure. Twombly, threatened by Mutch with personal financial ruin, admitted that the GE-Twombly, Inc. contracts were used to raise money for a payment to a Puerto Rican official. GE subsequently agreed to advance Twombly, Inc. an additional $2.75 million, conditioned on satisfactory completion of the STAG project, and GE thereafter carefully monitored and regulated Twombly, Inc.'s project expenditures.

Vernon Twombly's admissions to Carl Mutch were reported promptly to GE's top management, which ordered an internal investigation. As a result of the investigation, a GE attorney on November 5, 1975, met with the Governor of Puerto Rico and an official of the Puerto Rico Department of Justice. The attorney disclosed the essential elements of the scheme, including the identity of the alleged bribe recipient, and the Governor instructed the Department of Justice to investigate. Puerto Rican authorities notified GE in July 1976 that they had been unable to develop evidence that Velazquez Toro had received a bribe.[4] Puerto Rico has not charged any person with illegal conduct arising out of the STAG contract.

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4. Velazquez Toro had resigned his position with the PRWEA on July 31, 1975, and he died on December 19, 1975.

III.

The foregoing demonstrates conclusively that the illegal conspiracy terminated, as a matter of law, no later than November 5, 1975, the date of GE's disclosure to Puerto Rican law enforcement officials. The principal purposes of the conspiracy—payment of a bribe to Velazquez Toro and award of the contract to GE—were fully accomplished prior to that date. The general purpose that allegedly underlay the conspiracy and brought it within the ambit of §§1341 and 1343, the federal fraud statutes—to defraud the government and people of Puerto Rico of Velazquez Toro's faithful services—could not continue after the scheme was disclosed to high-ranking Puerto Rican officials with authority to order a prosecution. Furtherance of the concealment objective, if it continued to that date, was terminated by the disclosure. Thus no conduct after that date furthered the purposes of the illegal conspiracy alleged in the indictment. The cable transfer of funds on December 15, 1975, and the mailing of funds on June 27, 1976, can hardly be said to have related to the purposes of the conspiracy when GE, the prime defendant, had made a full disclosure to the governor of Puerto Rico on November 5, 1975. The government conceded at oral argument that no distinction can be made under the facts of this case between the substantive counts (for mail fraud, wire fraud and Travel Act offenses) and the conspiracy count, and that if the overt acts did not further the conspiracy, they will not support convictions on the substantive counts. The substantive convictions on Counts 2, 3, and 5 for conduct which occurred on those dates accordingly must be reversed.

IV.

We next consider appellants' argument that the second indictment, returned September 4, 1980, is barred by the

five-year statute of limitations, 18 U.S.C. §3282. Appellants contend that the objectives of the conspiracy were fully accomplished prior to September 4, 1975, and therefore that the prosecution is barred; and they argue alternatively that a new trial must be ordered because the prosecutor argued facts not supported by the evidence and improperly changed theories in his rebuttal. The government contends that the payments of September 5 and December 15, 1975, and June 27, 1976, furthered the conspirators' original scheme. We have previously held, however, that the conspiracy terminated no later than November 5, 1975, so our consideration of the government's argument must be limited to the September 5, 1975, wire transfer from Twombly, Inc. to TEE.

The September 5 transfer was a partial payment for two water wash skids, components of the residual fuel option. Viewed in the light most favorable to the prosecution, the evidence showed that GE added this equipment to the "scope transfer" to increase Twombly, Inc.'s profits and thereby to make additional funds available to Mothon for payment to Velazquez Toro.

We perceive three theories at least potentially available under the indictment to support a finding that this payment furthered the original purposes of the conspiracy: first, that some portion of the $94,441 was actually transferred from Twombly through TEE to Velazquez Toro to fulfill the bribe commitment; second, that the payment furthered the purposes of the conspiracy by reimbursing TEE and Mothon for prior payments to Velazquez Toro; and third, that the payment from Twombly, Inc. to TEE furthered the conspirators' plan to conceal their conduct. The first of these theories must be eliminated, however, because the government concedes that its evidence would not support a finding that Velazquez Toro received any portion of the bribe during the period of limitations. It defends the judgment on the

grounds that the September 5 transfer furthered the concealment purpose of the original conspiracy and that it was a reimbursement for earlier bribe payments from Mothon to Velazquez Toro.

We will require a new trial for several reasons. We need not decide whether any of the following factors alone would warrant a new trial. We are persuaded that in the circumstances of this complex case, the combination of these factors denied the defendants' due process right to a fair trial. First, it can be said that the defendants were denied reasonable notice and a fair opportunity to defend against the government's allegations. The district court should have required the prosecution prior to trial to announce specifically the factual basis for its contention that the conspiracy continued into the limitations period. Thereafter the court should have adhered to that theory in its instructions and similarly limited the prosecution in its arguments to the jury. Lacking specific prior notice of the government's factual scenario, the defendants were denied a fair opportunity to prepare and present evidence to rebut or defend against its contentions.

Second, this problem was compounded by the government's apparent tactical decision to argue a new interpretation of the evidence in its rebuttal to the defendants' closing arguments. The prosecutor—acknowledging that "I almost feel like I am going to . . . reach behind my back and pull out a rabbit"—presented a reimbursement scenario different from and inconsistent with his previous argument, and thus denied the defendants an opportunity to respond and rebut his contentions.[5]

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5. The prosecutor's "rabbit" included a handwritten chart designed to demonstrate that the payments of September 5 and December 15, 1975, and June 27, 1976, carried an aggregate of $101,000 in

Third, the government tainted the proceeding by suggesting in its closing arguments to the jury that the payments within the limitations period carried bribe money that was actually paid to Velazquez Toro, despite its prior concession in the jury's absence that no evidence supported such an argument. It is impossible for us to determine whether the jury rested its finding of guilt on the impermissible ground suggested in the prosecutor's closing, and therefore the judgments entered on the verdict must be set aside.[6] *Yates v. United States*, 354 U.S. 298, 312 (1957); *Government of the Virgin Islands v. Richards*, 618 F.2d 242, 244 (3d Cir. 1980).

We therefore will reverse the judgments of conviction on Counts 1, 4, and 7 and remand for a new trial; and we will require the government to inform the court and the defendants, at a reasonable date prior to retrial, of the specific theory on which it will attempt to prove that the conspiracy continued beyond September 4, 1975. If the prosecution elects on retrial to proceed on a theory of concealment to extend the conspiracy into the period of limitations, it should be required to meet the evidentiary

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bribe reimbursements to Mothon. The defendants had previously objected to the prosecution's use of a pre-printed chart in its initial summation which was to be used to show that $80,000 in bribe funds was transferred through these equipment purchases. The trial court overruled the objection because the defendants in their responsive summations would have the opportunity to demonstrate to the jury that the chart was "inapplicable, irrelevant, inaccurate, [or] misleading." The appellants' closing argument offered a factual scenario to demonstrate that the $80,000 had been transferred through equipment payments made outside of the limitations period. A similar opportunity was not available, however, with respect to the new chart and new dollar figure employed in the prosecutor's rebuttal.

6. The defendants prior to closing arguments requested a limiting instruction that would have excluded this ground from the jury's consideration, but the government objected and the request was denied. We therefore have no occasion to consider whether a proper instruction might have cured the taint.

burdens imposed by the Supreme Court in *Grunewald v. United States*, 353 U.S. 391 (1957). Specifically, it must present direct evidence that the conspirators originally expressly agreed to conceal the conspiracy, and it must show beyond a reasonable doubt that the September 5, 1975, transfer furthered that purpose. According to the teachings of *Grunewald*, neither circumstantial evidence permitting an inference of an agreement to conceal, nor direct evidence that the conspirators implicitly agreed to conceal, will satisfy the prosecution's burden of production. Moreover, the government may not rely on evidence that the conspirators agreed to conceal their doings from GE's internal auditors. Inasmuch as Vernon Twombly revealed the scheme to GE auditor Carl Mutch in June 1975, it is difficult to conclude that Twombly Inc.'s $94,441 payment to TEE in September 1975 could have furthered any such conspiratorial objective.

V.

Appellant Robert Naples argues that his resignation from GE effective August 29, 1975, constituted withdrawal from the conspiracy as a matter of law, and therefore that he cannot be prosecuted on an indictment returned more than five years after that date. The government has pointed to no evidence that Naples participated in the conspiracy in any way following his resignation, but it argues that his silence thereafter could be considered by the jury as evidence of his continuing participation. Because the government failed to produce evidence to rebut Naples' prima facie showing of withdrawal prior to the period of limitations, we hold that his convictions must be reversed on all counts.

The controlling precepts are familiar and require only a brief restatement. Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily consti-

tute withdrawal. The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *United States v. Lowell*, 649 F.2d 950, 955 & n.7 (3d Cir. 1981). When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. *See United States v. Lowell*, 649 F.2d at 959-60 & n.16; *United States v. Goldberg*, 401 F.2d 644, 648-49 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 & 394 U.S. 932 (1969).

Application of these precepts to this record requires reversal of Naples' convictions. Naples presented evidence that he resigned and permanently severed his employment relationship with GE in August 1975. In the circumstances of this case, that was sufficient to make out a prima facie case of withdrawal and to shift the burden of production to the government. Had the government impeached or rebutted Naples' evidence, the question properly would have gone to the jury. The government elected to stand on its proof, however, and therefore the district court erred in denying Naples' motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29.

VI.

We now turn to appellants' remaining contentions, most of which require little discussion. It is necessary for

us to address their arguments that Puerto Rico is not a "State" within the meaning of the Travel Act, that the government abused the grand jury's process, that the evidence was insufficient to sustain the convictions, that appellants Twombly, Inc. and GE withdrew from the conspiracy as a matter of law prior to the period of limitations, and that the Travel Act prosecutions are time-barred by application of the Puerto Rico statute of limitations for bribery prosecutions. We also consider appellants' evidentiary arguments, although their resolution is not strictly necessary to decision of this appeal, to guide the parties and the trial court on remand. We find it unnecessary at this time to resolve appellant Steele's objections to the instructions relating to his theory of defense.

A.

The Travel Act, 18 U.S.C. §1952, permits federal prosecutions based on the use of facilities of interstate commerce in furtherance of any "unlawful activity"; and it defines "unlawful activity," insofar as it is relevant to this case, as "bribery . . . in violation of the laws of the State in which committed." The Travel Act prosecutions under indictment No. 80-73 and count 4 of No. 80-320 rest on the theory that the payments of May 28 and September 5, 1975, furthered the unlawful activity of bribery in violation of the laws of Puerto Rico. Appellants argue that these counts must be dismissed because Puerto Rico is a Commonwealth within the federal union and not a "State" within the meaning of the act.

Our evaluation of this contention begins with the principles of statutory construction set forth in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), in which the Court held that Puerto Rico was a "territory" within the meaning of §3 of the Sherman Act. Whether Puerto Rico is a "state" within the meaning of §1952

> depends upon the character and aim of the act. Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.

302 U.S. at 258. Applying these principles, we have no difficulty rejecting appellants' argument. The limited legislative history demonstrates that Congress enacted the Travel Act at the insistance of Attorney General Robert F. Kennedy, who sought federal authority to assist "the States in combatting pernicious undertakings which cross State lines." Letter of April 6, 1961, to the Speaker of the House, *reprinted in* H.R. Rep. No. 966, 87th Cong. 1st Sess. , *reprinted in* 1961 U.S. Code Cong. & Ad. News 2664, 2666. The House Judiciary Committee explained that the act would "assist local law enforcement by denying interstate facilities to individuals engaged in illegal . . . enterprises." H.R. Rep. No. 966 at , 1961 U.S.C.C.A.N. at 2665. The act "reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem. The legislative response was to be commensurate with the scope of the problem." *United States v. Nardello*, 393 U.S. 286, 292 (1969). We find no reason to hold that Congress (or the Attorney General, who submitted the draft legislation that became §1952) chose the word "State" to deny Puerto Rican law enforcement the assistance extended to other localities within Congress' power to protect, and such a construction would manifestly disregard "the character and aim of the act[,] . . . the context, the purposes of the law, and the circumstances under which the words

were employed," *Puerto Rico v. Shell Co.*, 302 U.S. at 258. We hold therefore that bribery in violation of Puerto Rican law is "bribery . . . in violation of the laws of the State in which committed" within the meaning of §1952.[7]

B.

Appellants contend that the grand jury process was twice abused: first, that the one-count indictment against Twombly, Inc. was a "sham," sought only to enable the government to gather information concerning additional charges and additional defendants, and there-

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7. Our interpretation also is bolstered by the first circuit's observation, as early as 1953, that although Puerto Rico is not a state in the federal Union, "it would seem to have become a State within a common and accepted meaning of the word," *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953) (quoted with approval in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974)). *See also, e.g., Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Calero-Toledo;* and *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981) (holding that Puerto Rico is a state under various federal statutes); *but see Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (per curiam) (Puerto Rican statutes are not state statutes within 28 U.S.C. §1254(2), which authorizes appeals to the Supreme Court).

The decisions of the district court and this court in *United States v. Baker*, 241 F.Supp. 272 (M.D. Pa. 1965), *aff'd*, 364 F.2d 107 (3d Cir.), *cert. denied*, 385 U.S. 986 (1966), on which appellants rely, do not require a different result. The district court in *Baker* limited the word "State" in 18 U.S.C. §1953, a companion section to §1952, to a " 'State' within the constitutional sense, that is, a State of the Union." 241 F.Supp. at 279. That language was broader than necessary to the decision, because the "State" in question was Haiti, a foreign nation, and not a United States territory or Commonwealth; and it was not repeated by this court. Moreover, the district court in *Baker* relied on specific legislative history not applicable to §1952; it was construing an exception to the coverage of §1953, not the scope of the prohibition; and its holding has been effectively overuled by subsequent legislation, Pub. L. 96-90, §2(1), 93 Stat. 698 (1979), which added subsection (b)(5) to §1953.

fore that both indictments should have been dismissed; and second, that the later indictment was based upon hearsay and therefore was improperly returned.

We reject both contentions. As to the first, the government—notwithstanding appellants' present accusation that it concealed the true purpose of the first indictment—candidly stated that it was investigating additional charges and other defendants, and it does not appear to have concealed its knowledge that Bermuda courts would order the depositions of Bermuda residents only if there were an outstanding indictment. That the one-count indictment might assist the government to expand its investigation does not render it a sham, because it is clear that the indictment was more than a mechanism to open the doors of the Bermuda courts. First, it does not appear, and appellants do not argue, that the first indictment was sought without probable cause. Second, the information the government was able to obtain because of the first indictment clearly related to that charge. To the extent that the information obtained served also as a foundation for the second indictment, that indictment concerned the same illegal scheme. Third, and most significant, the government actually pursued the prosecution and Twombly, Inc. was ultimately convicted under the first indictment. We conclude, therefore, that the district court did not abuse its discretion in denying appellants' motions to dismiss the two indictments.[8]

Appellants also argue that they were deprived of their right to be tried only upon a properly returned indictment. They accuse the government of misleading the

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8. For the same reasons we reject appellants' alternative arguments that the district court should have suppressed the evidence gathered in Bermuda or have held an evidentiary hearing.

grand jury with hearsay evidence that inaccurately characterized the position of GE employee Frank Ayer. Ayer did not testify before the grand jury; rather, a Customs Service agent presented testimony based on notes Ayer had written during meetings of the scheme's participants. Appellants contend that if Ayer had testified, he would have contradicted the implication of the agent's hearsay testimony that the residual fuel equipment carried a portion of the bribe fund. The presentation of hearsay evidence, in appellants' view, kept from the grand jury critical exculpatory evidence concerning the statute of limitations issue.

We have held that an indictment may be based upon hearsay evidence, *United States v. Wander*, 601 F.2d 1251, 1260 (3d Cir. 1979), and appellants' arguments fail to persuade us that the government's use of the hearsay evidence in this case requires invalidation of the indictments. The government did not misrepresent the hearsay testimony as a more reliable form of evidence. Moreover, although the grand jury did not hear it from Ayer himself, the defense's theory on the statute of limitations issue was accurately summarized by the prosecutor. We therefore reject appellants' contention that the indictment was improperly returned.

C.

Appellant Schenectady Turbine Services challenges the sufficiency of the evidence to support its conviction. We think the evidence, while not overwhelming, was sufficient to allow the jury to find beyond a reasonable doubt that Schenectady was guilty as charged. The government presented evidence designed to show that Schenectady—through its agent and majority stockholder Mothon, who negotiated both sides of the Schenectady-TEE contracts—actively participated in

the criminal enterprise, and we cannot fault the jury for crediting that evidence and drawing the inferences urged by the prosecution therefrom.

D.

Appellants GE and Twombly, Inc. argue separately but similarly that the evidence was insufficient to sustain their convictions because the government's proof was inconsistent with certain language used in the two indictments. Indictment No. 80-73, which charges Twombly, Inc. in a single count with violating the Travel Act, alleges that Twombly, Inc., after May 28, 1975, "caused the deposit of an additional $377,765.98 to the account of Turbo Electric Equipment Ltd. at the Bermuda National Bank from which a bribe was to be paid to a Puerto Rican official." Indictment No. 80-320 alleges that a purpose of the scheme was to "disguise and conceal the bribe fund to be paid to Carlos Velazquez Toro . . . ." Focusing on the use of the future tense—"to be paid"—Twombly, Inc. contends that its conviction at No. 80-73 must be reversed because there is no evidence that Velazquez Toro received any of the "additional $377,765.98"; and GE argues that convictions obtained by proof of concealment of an accomplished bribe represent an unconstitutional amendment of the indictment. We reject these contentions; appellants make too much of the semantics and disregard the substance of the charges. The language of the indictments was ambiguous, but it did not deny the defendants reasonable notice. Twombly, Inc.'s argument rests on the assumption that Toro was to receive a bribe directly from the additional $377,765; the government correctly responds that the indictment would permit proof, and that it did prove, that Toro was paid a bribe from the TEE account. GE's argument fails because nothing was stated in the indictment suggesting that the purpose of conceal-

ment came to an end after Toro received the money; the language quoted simply speaks as of the time the agreement was formulated, when the bribe was "to be paid."

E.

Twombly, Inc. contends that it withdrew from the conspiracy as a matter of law in June 1975, when Vernon Twombly revealed the scheme to GE auditor Carl Mutch; and GE argues that it withdrew as a matter of law before September 4, 1975, by commencing an investigation in response to Twombly's disclosures. We disagree. Rather, we agree with the trial court that under the evidence of record the question of withdrawal prior to the period of limitations was properly left to the jury.

F.

Appellant Hoyt Steele argues that all Travel Act charges are time-barred because the applicable statute of limitations is not 18 U.S.C. §3282 (five years) but the Puerto Rico statute that limits prosecution for the predicate offense, P.R. Laws Ann. tit. 33, §4363 (three years). We disagree. "It must be made clear that 18 U.S.C. §1952 charges a Federal crime," *United States v. D'Amato*, 436 F.2d 52, 54 (3d Cir. 1970), and the relevant statute of limitations must be found in federal law. *United States v. Cerone*, 452 F.2d 274, 286-87 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). As we said in *United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977), a case under the RICO statute, 18 U.S.C. §§1961 *et seq.*, "[h]ad Congress intended state statutes of limitations to apply to a federal criminal statute it would have so stated."

G.

Appellants launch a three-pronged attack on the admission of Bermuda bank records and videotaped depositions introduced to prove that Mothon actually paid the $1.25 million bribe to Velazquez Toro. They argue that the bank records were inadmissible hearsay; that use of the depositions violated Fed. R. Evid. 804(b)(1) and the Confrontation Clause, U.S. Const. amend. VI; and that both categories of evidence were irrelevant.

The government offered the bank records under Fed. R. Evid. 803(6), the hearsay exception for business records; but the district court—apparently on its own motion—admitted them pursuant to Rule 803(24), the "catch-all" exception.[9] The government steadfastly maintains that the records are admissible under Rule 803(6), and it alternatively defends the district court's ruling under Rule 803(24). Appellants argue to the contrary, contending that the court erred in admitting the evidence under Rule 803(24) because the government did not give advance notice that it intended to rely on the rule. We need not reach these contentions given our decision that Counts 1, 4 and 7 must be retried and our

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9. Rule 803(24) provides that the following shall not be excluded by the hearsay rule:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

conclusion that their admissiblity, if erroneous, was harmless as to the conviction of Twombly, Inc. which is affirmed herein. We suggest, however, that if the issue arises at the new trial the court should ensure that the element of trustworthiness required under Rule 803(24) and the requirements of Rule 803(24)(C) are fully satisfied.

Appellants rely on Fed. R. Evid. 804(b)(1), which permits substantive use of deposition testimony only when the witness is unavailable and the party against whom his testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *See also* Fed. R. Crim. P. 15(e). Rule 804(a)(5) defines unavailability as absence from the trial when "the proponent of [the witness' prior] statement has been unable to procure his attendance . . . by process or other reasonable means." The Confrontation Clause of the sixth amendment permits such evidence when "the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." *Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980). We have carefully reviewed the record and the submissions of the parties, and we hold that the district court neither erred nor abused its discretion in permitting introduction of the depositions.

We reject appellants' contention that the evidence was irrelevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401. "The standard of relevance established by [Rule 401] is not high," *Carter v. Hewitt*, 617 F.2d 961, 966 (3d Cir. 1980), and once the threshold of logical relevancy is satisfied the matter is

largely within the discretion of the trial court, *see Hamling v. United States*, 418 U.S. 87, 124-25 (1974). The disputed evidence, which indicated that Mothon had delivered approximately $1.25 million to Velazquez Toro in Bermuda in 1974, when considered together with other evidence in this case, manifestly made more probable the existence of a scheme to pay Velazquez Toro to manipulate the contract selection in favor of GE; and the district court did not err or abuse its discretion. Nor did the court abuse its discretion in determining that the relevance of the evidence outweighed its potential for causing unfair prejudice. Fed. R. Evid. 403.

We also reject the contention that Mothon should have been given limited immunity to testify that he and Velazquez Toro had entered into other transactions, thus vitiating the relevance of the government's evidence. Defense witness immunity "will be denied if the proffered testimony is found to be ambiguous, [or] not clearly exculpatory . . . ." *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980). The defendants' proffer did not indicate that Mothon would directly connect the payments in question to any other transaction. The requested immunity therfore was properly denied on the ground that the evidence would be ambiguous and not clearly exculpatory.

H.

Appellants argue also that the district court erred and abused its discretion in allowing the government to take testimony by deposition in Bermuda, because the depositions were taken for purposes of discovery and pursuant to a Request for International Judicial Assistance, or "letter rogatory," which the district court had no authority to issue. These contentions require only a brief discussion.

We recognize that Fed. R. Crim. P. 15, which provides for the taking of depositions in criminal cases, does not authorize their use as means of discovery;[10] but we cannot agree with appellants that the depositions at issue were used as discovery tools. Appellants emphasize that the government could not demonstrate to the district court the materiality of the proposed testimony. In view of the government's inability to gain access to the proposed deponents, however, we agree with the district court that under the extremely unusual circumstances of this case it could not insist on the usual showing of materiality. In the ordinary case, where the witnesses reside in the United States, the witness who will be unavailable for trial will be available sometime prior to the deposition so that the parties will know with reasonable certainty the materiality of the proposed testimony. We believe that the district court appropriately accepted a reduced showing of materiality to avoid denying important evidence to all the parties, including the appellants, the court, and the jury.

Appellants' argument that a district court in a criminal case may not issue Requests for International Judicial Assistance, or letters rogatory, also fails. Fed. R. Crim. P. 15(d) directs that depositions are to be taken in the manner provided in civil actions, and Fed. R. Civ. P. 28(b)(3) authorizes the taking of depositions in foreign countries "pursuant to a letter rogatory." Therefore, the district court did not err in issuing the disputed Request.

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10. Fed. R. Crim. P. 15(a) provides in part:
Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition. . . .

I.

Appellants contend that the court erred in permitting GE employee Frank Ayer to read certain notes to the jury over a hearsay objection, pursuant to Fed. R. Evid. 803(5).[11] We do not agree. The court heard Ayer testify extensively on voir dire, and it carefully limited admission to those portions of the notes that satisfied the requirements of Rule 803(5). Appellants' objection that Ayer lacked personal knowledge of the matters recorded is irrelevant. The notes were introduced to prove the declarations of co-conspirators, which are non-hearsay under Fed. R. Evid. 801(d)(2)(E), and not to prove directly the truth of the matters stated. Nor did the court err or abuse its discretion in permitting Ayer to interpret the notes to the jury; once the notes were admitted under Rule 803(5) they were subject to testimonial interpretation the same as any ambiguous document properly admitted in evidence. We also reject the suggestion that the court abused its discretion in determining that the notes' probative value outweighed their potential for unfair prejudice, Fed. R. Evid. 403.

J.

We are more sympathetic to appellant Steele's objections to the court's instructions to the jury. Steele first submitted proposed instructions outlining his contentions and their significance for his theory of defense, and his counsel thereafter agreed with the prosecutors to submit a modified set of instructions designed to avoid the gov-

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11. Rule 803(5) provides that the following shall not be excluded by the hearsay rule, even though the declarant is available to testify:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

ernment's objections to his initial proposal. Notwithstanding the government's acquiescence in the revised proposal, however, the court declined Steele's request and relied on a standard formbook of jury instructions. Standard form instructions should "not be swallowed whole"; they are designed "as an aid to the preparation of an appropriate instruction in the particular case. . . . Each case has its own peculiar facts and formalized instructions must be tailored to the requirements of the facts and issues." 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §8.03 at 247 (3d ed. 1977). We need not decide whether the court committed a reversible abuse of discretion in rejecting Steele's proposed instructions, because there must be a new trial in any event. A district court should be extremely cautious in rejecting a defendant's proposed instructions in the absence of a specific objection from the government, however, and it should indicate on the record the reasons for its decision to do so.

VII.

The judgment of the district court on indictment No. 80-73 will be affirmed. The judgments of conviction and sentence on counts 2, 3, and 5 of indictment No. 80-320, and appellant Robert Naples' convictions on all counts, will be reversed on the basis that directed verdicts of acquittal should have been entered. The remaining judgments of conviction and sentence on counts 1, 4, and 7 of indictment No. 80-320 will be reversed and the cause remanded for a new trial on these counts in accordance with the foregoing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2130 & 81-2184/85/86/87/88/89

UNITED STATES OF AMERICA

v.

STEELE, HOYT P.,
Appellant in No. 81-2130

(D.C. Criminal No. 80-00320-02)

UNITED STATES OF AMERICA

v.

GENERAL ELECTRIC COMPANY,
Appellant in No. 81-2184

(D.C. Criminal No. 80-00320-01)

UNITED STATES OF AMERICA

v.

NAPLES, ROBERT,
Appellant in No. 81-2185

(D.C. Criminal No. 80-00320-03)

UNITED STATES OF AMERICA

v.

TWOMBLY, INC.,
Appellant in No. 81-2186

(D.C. Criminal No. 80-00320-04)

UNITED STATES OF AMERICA

v.

SCHENECTADY TURBINE SERVICES, LTD.,
Appellant in No. 81-2187

(D.C. Criminal No. 80-00320-05)

UNITED STATES OF AMERICA

v.

MOTHON, CHARLES,
Appellant in No. 81-2188

(D.C. Criminal No. 80-00320-06)

UNITED STATES OF AMERICA

v.

TWOMBLY, INC.,
Appellant in No. 81-2189

(D.C. Criminal No. 80-00073)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ALDISERT, WEIS, and BECKER, *Circuit Judges.*

JUNE 16, 1982
JUDGMENT OF THE
THIRD CIRCUIT COURT OF APPEALS

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 26, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 10, 1981 in D.N.J. Crim. No. 80-73 (C.A. No. 81-2189) be, and the same is hereby affirmed. It is further ordered and adjudged that the judgments entered June 24, 1981, in D.N.J. Crim. No. 80-320 (C.A. Nos. 81-2130 and 81-2184), and entered June 26, 1981, in D.N.J. Crim. No. 80-320 (C.A. Nos. 81-2186, 81-2187 and 81-2188), be and same are hereby reversed on the basis that directed verdicts of acquittal should have been granted with respect to Counts 2, 3 and 5 of the said indictment, reversed with respect to Counts 1, 4, and 7 of the said indictment, and the cause remanded for a new trial on these counts. It is further ordered and adjudged that the judgment entered June 26, 1981, in D.N.J. Crim. No. 80-320 (C.A. No. 81-2185) be, and the same is hereby reversed as to all counts. All of the above in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS

Clerk

June 16, 1982

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CRIMINAL NO. 80-320

UNITED STATES OF AMERICA

vs.

GENERAL ELECTRIC COMPANY, et al.,

Defendants,

Trenton, New Jersey
October 1, 1980

OCTOBER 1, 1980 OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Before: The Honorable Anne E. Thompson, U.S.D.J.

Appearances:

UNITED STATES DEPARTMENT OF JUSTICE
BY: JOSEPH COVINGTON, ESQ.
Attorney for the Government

MESSRS. SHEA & GARDNER
BY: HENRY RUTH, ESQ. (D.C. BAR)
Attorneys for the Defendant General Electric Company

MESSRS. KASANOF & SCHWARTZ
BY: ROBERT KASANOF, ESQ. (N.Y. BAR)
Attorneys for the Defendant Hoyt P. Steele

MESSRS. PEPPER, HAMILTON & SCHEETZ
BY: DAVID RICHMAN, ESQ. (P.A. BAR)
Attorneys for the Defendant Robert Naples

MESSRS. CUMMINS, DUNN,
HOROWITZ & PASHMAN
BY: DONALD HOROWITZ, ESQ.
Attorneys for the Defendant Twombly, Inc.

MESSRS. LOWENSTEIN, SANDLER,
BROCHIN, KOHL, FISHER & BOYLAN
BY: MATTHEW P. BOYLAN, ESQ.
THEODORE V. WELLS, JR., ESQ.
Attorneys for the Defendant Charles Mothon

(3) THE COURT: The United States has petitioned this Court to request the assistance of the appropriate judicial authorities of three foreign countries to obtain evidence to be used in the trial of the above captioned matter. Specifically, the government has requested this Court to issue an order pursuant to Rule 15(a) of the *Federal Rules of Criminal Procedure*, granting leave to take the depositions of the following prospective government witnesses:

BERMUDA—
Custodian of Records
Bermuda National Bank

An official of the
Bermuda Monetary Authority

The Registrar of Companies
of Bermuda

William Cox

Michael B. Collins

CANADA— Michael Candy
Bank of Nova Scotia
Toronto, Ontario

Warren Kuk
Touche Ross & Company
Toronto, Ontario

Bruce Forcey
Bank of Nova Scotia
Calgary, Ontario

ENGLAND— Douglas Field
Frome, Somerset

If such an order under Rule 15(a) is granted, the United States proposes to proceed to take these depositions by means of oral examinations pursuant to requests for International Judicial Assistance (Letters Rogatory) filed (4) with this Court. The government has requested that these examinations be videotaped, and conducted before this Court or before a designated United States Magistrate, acting on behalf of this Court.

Rule 15(a) of the *Federal Rules of Criminal Procedure* provides in relevant part:

Depositions:

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the Court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

In order to take evidence abroad in a criminal proceeding, when there is no relevant treaty agreement and

no voluntary arrangement between the parties and witnesses, a party must seek the assistance of foreign judicial authorities. The request for such assistance, however, must emanate from a judicial authority in this country.

A letter of request, also called a letter rogatory, is a formal application from a court in one country addressed to a court in another country seeking international judicial assistance, usually for purposes of effecting service (5) of process or for taking or obtaining evidence.

As for compelling witnesses to appear and produce documents, the matter rests within the discretion of the foreign court and depends on large part on the law of that jurisdiction. This Court's subpoena power does not extend to witnesses who are not nationals or residents of the United States who are in a foreign country. *See* 28 U.S.C. Section 1783(a).

Counsel for the government also cite *Federal Rule of Criminal Procedure 57(a)* in conjunction with *Federal Rules of Civil Procedure 28(b)*. Despite the challenges raised by defendant Robert Naples to the power of the Court to order these depositions, I am persuaded that these procedures are authorized.

Defendants oppose the taking of these depositions for a variety of reasons. Among these reasons are the following:

1. It is argued that the government has failed to show the "exceptional circumstances" required by Rule 15(a) Defendants point to the several standards developed in the case law (See *U.S.A. vs. Whiting*) 308 F.2d 537 (2nd Cir. 1962) as a basis for the granting of deposition requests in criminal matters:

a. The first such showing under Rule 15(a) is that the prospective witness will be unavailable at trial. *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978);

United States v. Rich, 580 F.2d 929, 934 (9th Cir. 1978). The Court is satisfied that the statements by counsel for the (6) United States, Mr. Joseph Covington, in his affidavit, are sufficient to meet the requirements of this first standard. The proposed witnesses are foreign nationals who are not subject to subpoena power. According to Mr. Covington's affidavit, they or their attorneys have refused to agree to their coming to the United States to testify.

The case at hand does not present a situation like the one found in *United States v. Mann, supra*, where the government itself caused the witness' unavailability. There the government had its witness in the country, and attempted to invoke Rule 15(a) as a means of clearing the way for the witness to leave the country. Here, however, the government is without any other means of obtaining the requested testimony.

> When the question is close a Court may allow a deposition in order to preserve a witness' testimony leaving until trial the question of whether the deposition will be admitted as evidence.

Id. at 366. Of course the Court will have to review and make rulings on the admissibility of all of the proposed depositions when they are complete.

b. The second required showing under Rule 15(a) is that the witness' testimony be material to the issues in the case. This is a most difficult judgment for a court to make prospectively, without the opportunity to review a sworn statement of the proposed witness. In the typical (7) Rule 15 application, a witness who may be unavailable *for trial* will logically be available at some time *before trial*. Thus, the party requesting leave to conduct a Rule 15 deposition will have taken a statement of the witness' testimony. Rule 15 proceedings would be applied for simply as a way of preserving that witness'

testimony, because that witness would be unavailable at trial because of death, severe illness or other such circumstances.

Here, on the other hand, we have prospective witnesses who have been either totally unavailable before trial or available only at a previous letters rogatory proceeding. The fact that they are foreign nationals adds an element to the facts before this Court that is simply not addressed by the cases the Court has reviewed. The relevancy of the proposed testimony is described in Mr. Covington's affidavit. I am satisfied that this is not a proposed fishing expedition. It appears to me that I should apply the reasoning of the Court in *United States v. Bronston*, 321 F. Supp. 1269, 1271 (S.D.N.Y. 1971), where it was stated that "the mere fact that a necessary witness is a foreign national domiciled abroad and beyond the subpoena power of the Court does not mandate an order pursuant to Rule 15, (but) it is an impelling consideration." We are persuaded that the almost complete unavailability of these proposed witnesses absent letters rogatory issued pursuant to a Rule 15 order (8) is an "impelling consideration" in assessing the government's showing of materiality.

c. The third required showing under Rule 15(a) is "the availability of the proposed witnesses at the deposit proceedings and their willingness to appear." *United States v. Whiting*, 308 F.2d 537, 541 (2d Cir. 1962). We are satisfied that though the conclusory statements in Mr. Coving's affidavit asserting that the witnesses would testify if directed to do so by the local judicial authorities, may not be the ideal showing, they are sufficient to meet this requirement. The practicability requirement is met inasmuch as the application comes approximately two months before trial. We do not face it "on the eve of trial" as in *United States v. Whiting*.

d. The fourth required showing under Rule 15(a) is that a deposition be necessary in order to prevent a failure of justice. *Id.* The statements in the affidavit of government's counsel discuss the need for the sought-after testimony in order for the government to present a complete case. Again, the statements in Mr. Covington's affidavit are scanty but I am satisfied that the government is proceeding in good faith.

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CRIMINAL NO. 80-320

UNITED STATES OF AMERICA

vs.

GENERAL ELECTRIC COMPANY, et al

Defendants.

AFFIDAVIT OF JOSEPH P. COVINGTON

I, Joseph P. Covington, being duly sworn, do hereby state as follows:

1. I am an attorney employed by the Fraud Section, Criminal Division, Department of Justice in Washington, D.C., assigned to handle the above case on behalf of the United States.

2. I am making this Affidavit in support of a Motion to take pretrial depositions of MICHAEL CANDY, BRUCE FORCEY, WARREN KUK, THE CUSTODIAN OF RECORDS FOR THE BERMUDA NATIONAL BANK, WILLIAM COX, MICHAEL B. COLLINS, ANY OFFICER OF THE BERMUDA MONETARY AUTHORITY, THE REGISTRAR OF COMPANIES, BERMUDA, and DOUGLAS FIELD.

3. I was advised by Charles Manuel, Esquire of the law firm of Shearman and Sterling in New York, representing the Bank of Nova Scotia, that MICHAEL CANDY is an employee of the Bank of Nova Scotia,

residing in Toronto, who during 1974 and 1975 had been working as a bank manager at the Bermuda National Bank. Mr. Manuel further advised me that MICHAEL CANDY was prepared to testify that he recalled knowing Charles Mothon and Carlos Velazquez Toro while working at the Bermuda National Bank. I have further been advised that MR. BRUCE FORCEY took over Mr. Candy's function as manager at the Bermuda National Bank in August of 1975. Bank records reveal that on August 19, 1975, Mr. Forcey caused a certificate of deposit belonging to Turbo Electric Equipment, Ltd. in the amount of $165,800.23 to be cashed before its maturity date. Turbo Electric Equipment account ledgers reveal that $165,800.23 were deposited to Turbo's checking account that day, and that only two withdrawals were made on August 19, one for $4,900 and one for $20,000. Bermuda Immigration records reveal that Charles Mothon, owner of Turbo Electric Equipment, Ltd. and Carlos Velazquez Toro traveled together to Bermuda on August 19, 1975 with a stated intention of leaving Bermuda that same day. However, Mr. Manuel, following instructions from the Bank of Nova Scotia and the Bermuda National Bank (partially owned by the Bank of Nova Scotia), will not allow Michael Candy or Bruce Forcey to testify in the United States concerning these matters. He advised me that we must file a letters rogatory request in Canada to obtain the testimony of Michael Candy and Bruce Forcey. Both witnesses are Canadian citizens and beyond the subpoena power of the United States.

4. Mr. Warren Kuk is presently an accountant with the firm of Touche Ross in Toronto, Ontario. Mr. Kuk was formerly employed in Hamilton, Bermuda as an accountant with the firm of Anfossi & Company, Ltd. In that capacity, Mr. Kuk handled the affairs of Turbo Electric Equipment, Ltd. from some time after Mr. Col-

lins resigned in October 1975 to the time Turbo Electric was liquidated in 1978. Mr. Kuk also handled Turbo Electric's liquidation. It is believed that Mr. Kuk will be able to give relevant testimony on the affairs of Turbo Electric as they relate to Power Equipment. Mr. Kuk has indicated through the General Counsel for Touche Ross that he will not come to the United States to testify. Mr. Kuk is a British citizen and beyond the subpoena power of the United States.

5. Pursuant to a previous proceeding in the matter of a request for International Judicial Assistance to the Supreme Court of Bermuda in CR 80-73, *United States v. Twombly, Inc.* certain account records of Turbo Electric Equipment, Ltd. were obtained. A Custodian of Records for the Bermuda National Bank (Trevor Allwood) appeared and submitted all available bank records for the Turbo Electric Equipment accounts. Mr. Allwood also made available for inspection and copying records of an account in the name of Power Equipment Ltd., Carlos V. Toro, President. A comparison of the bank accounts of Turbo Electric and Power Equipment establishes that large transfers were made by the former to the latter. It will be necessary to have these records available as evidence so they can be shown to Michael Candy and Bruce Forcey to enable them to recall transactions which occured many years ago. I have also been informed by the Bermuda National Bank that specific transfers exist which establish that International Gas Turbine Services, Ltd., and Turbine Services, Ltd. of Bermuda made large transfers to Power Equipment Ltd. These companies were controlled by Charles Mothon.

The Bermuda National Bank has refused to deliver any bank records to the United States for a trial in this matter. However, the bank will respond to an order of the Supreme Court of Bermuda granted pursuant to a request for international judicial assistance which specifi-

cally directs the Bank to deliver records of any specific accounts.

6. Mr. Michael B. Collins is the managing director of a management firm in Hamilton, Bermuda called Argonaut Ltd. Mr. Collins acted as a management agent for Turbo Electric Equipment, Ltd. from as early as January 1974 to October of 1975. Mr. Collins testified at a previous rogatory commission proceeding in Hamilton, Bermuda in the case of *U.S. v. Twombly, Inc.*, CR 80-73, that he knew Charles Mothon and conducted all the financial affairs of Turbo Electric at the direction of Mr. Mothon.

It has recently come to my attention that Mr. Collins was also the manager for Power Equipment, Ltd., and therefore must have dealt with its President, Carlos V. Toro, although Mr. Collins testified he did not know a Carlos V. Toro. Mr. Collins is a British citizen beyond the subpeona power of the United States. Mr. Collins has refused my request to come to the United States for trial.

7. Mr. William Cox is a member of the Hamilton law firm of Cox and Wilkenson. Mr. Cox appears as a director of both Turbo Electric Equipment, Ltd. and Power Equipment, Ltd. Mr. Cox previously testified in the matter of *U.S. v. Twombly, Inc.*, CR 80-73, that he knew Charles Mothon as the individual who directed the affairs of Turbo Electric Equipment, Ltd. Mr. Cox recently advised me that he still had some minute books and other records of Power Equipment, Ltd.

At the time of the rogatory commission proceeding in Twombly, Inc., Mr. Cox advised me he would not testify at a trial in the United States. Mr. Cox is a British citizen and beyond the subpoena power of the United States.

8. The Bermuda Monetary Authority is an agency of the Bermuda government which controls among other things, exempt companies. Under Bermuda law the own-

ership of such exempt companies may be held in trust for the true owner by other persons or corporations. Information of such beneficial ownership is known by the Bermuda Monetary Authority, but they may be compelled to disclose such ownership information only by an order of a court in Bermuda. The beneficial ownership of the stock of Turbo Electric Equipment, Ltd., International Gas Turbine Services, Ltd. Turbine Services, Ltd., and Power Equipment, Ltd. is known to the Bermuda Monetary Authority and constitutes evidence necessary to the successful prosecution of this case.

9. The Registrar of Companies is an agency of the government of Bermuda which maintains official records on all exempt companies operating in Bermuda. The offical documents of the Registrar pertaining to Turbo Electric Equipment, Ltd., International Gas Turbine Services, Ltd., Turbine Services, Ltd., and Power Equipment Ltd., their existence, ownership, directors and officers are necessary to the successful prosecution of this case. The Registrar will only produce such documents pursuant to an order of a Bermuda Court.

10. Douglas Field is presently an attorney working in Frome, England. In 1973, 1974, and 1975 Mr. Field was employed by Cox and Wilkenson in Hamilton, Bermuda. In that capacity, he directed the affairs of both Turbo Electric Equipment, Ltd. and Power Equipment, Ltd. Mr. Field was, in fact, the Secretary for Power Equipment, Ltd. Mr. Field executed a purchase order on behalf of Turbo Electric Equipment, Ltd. for approximately 4.2 million dollars in equipment which was the vehicle for transferring $1,250,000 in bribe moneys from General Electric and Twombly, Inc. Mr. Field was also the named individual at Cox and Wilkenson to whom the Bermuda National Bank sent all bank statements and cancelled checks for both Turbo Electric Equipment, Ltd. and Power Equipment, Ltd.

Mr. Field is a British citizen and beyond the subpoena power of the United States. He has informed me that he will not testify in the United States.

/s/ Joseph P. Covington

JOSPEH P. COVINGTON
Attorney
Department of Justice
Washington, D.C.

Dated September 19, 1980

NOTARIZED